SUPREME COURT, U. S.
Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-522

GIBSON & PERIN CO., et al.,
Petitioners,

vs.

CITY OF CINCINNATI,
CINCINNATI REDEVELOPMENT CORP.,
ASSOCIATED DRY GOODS CORPORATION,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT CITY OF CINCINNATI IN OPPOSITION

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	5
ARGUMENT	5
I. The Court of Appeals Decision is Correct	5
II. There is no Conflict of Decision	9
III. The State Questions Were Correctly Decided	10
IV. Urban Renewal is a Governmental Function	14
V. There was no Departure from the Accepted and Usual Course Judicial Proceedings	17
CONCLUSION	17

TABLE OF AUTHORITIES

Page

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 6, 7, 8

Baker v. Carr, 369 U.S. 186 (1962) 9

Barlow v. Collins, 397 U.S. 159 (1970) 6, 8

Berman v. Parker, 348 U.S. 26 (1954) 5, 7

Broughton v. Cleveland, 167 Ohio St. 29, 146 N.E. 2d 301 (1957) 15

Bulen v. Moody, 77 Ohio App. 61, 63 N.E. 2d 916 (Franklin County 1945) 11

Cincinnati v. Batsch, 52 Ohio St. 324, 40 N.E. 21 (1895) 14

City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir., 1972) 9

Corbean v. Xenia City Board of Education, 366 F.2d 480 (6th Cir., 1966) 16

Fry v. O'Leary, 141 Wash. 465, 252 Pac. 111, 49 ALR 1249 (1927) 12

Griggs v. Alleghany County, 369 U.S. 84 (1962) 9

Investment Company v. Camp, 401 U.S. 617 (1971) .. 9

Sayre v. United States, 282 F. Supp. 175 (D.C. Ohio 1967) 15

Sears v. City of Cincinnati, 31 Ohio St. 2d 157, 285 N.E. 2d 732 (1973) 16

Page

Springfield Television, Incorporated v. City of Springfield, Mo., 462 F.2d 21 (8th Cir., 1972) 9

State ex rel. Merritt v. Linzell, 163 Ohio St. 97, 126 N.E. 2d 53 (1955) 10

State ex rel. McKay v. Kauer, 156 Ohio St. 347, 102 N.E. 2d 703 (1951) 12

State ex rel. Bruestle v. Rich, 159 Ohio St. 13, 110 N.E. 2d 778 (1952) 15

State ex rel. Schiederer v. Preston, 170 Ohio St. 542, 11 O.O. 2d 369 (1960) 13

United States v. Causcy, 328 U.S. 356 (1949) 9

Virgin Islands Hotel Association v. Virgin Islands W & P Authority, 465 F.2d 1272 (3rd Cir. 1972) .. 9

Woodland Market Realty Co. v. Cleveland, 426 F.2d 955 (6th Cir., 1970) 16

Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210 (1927) 15, 16

TABLE OF OTHER AUTHORITIES

Constitution of the State of Ohio, Article I, Section 19 ..... 15, 16

Ohio Revised Code, Section 723.06 ..... 10, 11, 13

42 U.S.C., 1441 et seq. 8

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BRIEF FOR RESPONDENT CITY OF CINCINNATI IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (Appendix page 1) is reported at 480 F. (2d) 936. The Memorandum of Decision of the District Court (Appendix page 18) is not yet reported.

JURISDICTION

The jurisdictional requisites for the Petition for Writ of Certiorari are adequately set forth in the petition.

STATEMENT

This case concerns the Cincinnati Business District Core Project Urban Renewal Plan, hereafter referred to as "Plan". Cincinnati City Council in 1962, after two public hearings, adopted the Plan by ordinance. City Council amended the Plan in 1964 and 1965. Since adoption and implementation of the Plan many old dilapidated, unsafe business buildings in blighted sections of Cincinnati have been torn down and replaced with fine, new, privately-owned buildings, with the help of private industry. The opinion of the Sixth Circuit Court of Appeals notes, urban renewal in Cincinnati has been an outstanding success and real boon to the city. The Court of Appeals further notes, that of all the many new buildings that have been constructed under the Plan, only the one in issue here has been questioned and that is Pogue's seven-story shoppers' parking garage, which opened June 1, 1967. (Appendix page 1). The garage serves shoppers going to Pogue's and other department stores; and, in addition, provides parking for customers of other business places in the downtown core area. Open twenty-four hours a day, seven days a week, the garage provides parking for at least 1,200 cars, which is almost four times more parking than was previously available in the area. Retail space has been built into the garage at street level, part of which is rented to Closson's.

The garage was constructed under the terms of a contract between the City of Cincinnati and the developer, Cincinnati Redevelopment Corp., a private Ohio corporation, hereafter referred to as C.R.C. In 1965, when the City and C.R.C. entered into the development contract, C.R.C. agreed, inter alia, to construct a shopper-oriented

parking garage on urban renewal Block D[1] at the earliest possible time and in conformity with the Urban Renewal Plan. As built, the garage is located on the southerly portion of Block D, between Race and Elm Streets and along the north side of Fourth Street. Scissors ramps for vehicular traffic entering the garage were installed on the Fourth Street side of the garage to separate pedestrian traffic on the sidewalk area from vehicular traffic entering and exiting the structure. Elevators for pedestrian access are installed in an elevator tower at the east end of the building, on the west side of Race Street.[2]

When the garage was completed in 1967 it was conveyed by C.R.C. to Adcor Realty Company, a wholly-owned subsidiary of Associated Dry Goods Corporation, which operates Pogue's Department Store through one of its divisions.

The plaintiffs, all located outside the Urban Renewal Area, are retail merchants and the owner of a French restaurant, all with places of business owned or leased on the south side of Fourth Street, and located opposite the parking garage. They do not like the design and location of the parking garage. Plaintiffs on July 2, 1966, about one year after the City and C.R.C. entered into a development contract for Block D, filed their original complaint. Thereafter the complaint was twice amended and the case went to trial on the Third Amended Complaint[3] in which plain-

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[1] Block D, is an entire city block in the core of Cincinnati's central business district, and is bounded on the south by Fourth Street, on the west by Elm Street, on the north by Fifth Street, and on the east by Race Street.

[2] The garage meets the objectives of the Urban Renewal Plan. The objectives of the Plan are set forth, in part, at pages 10, 11 and 12 of the Petition For a Writ of Certiorari.

[3] This case was tried in the District Court without a jury. The trial began June 2, 1970, and concluded June 25, 1970; the Memorandum

tiffs claimed, inter alia, a change in the Plan was made and they did not receive the benefits from the Urban Renewal project which they expected. Plaintiffs accused defendants of violating their civil rights, conspiracy, fraud, violation of federal and state anti-trust laws, denial of due process of law and equal protection of the laws.

Defendants named in the Third Amended Complaint were the City of Cincinnati; William C. Wichman, who was City Manager, and is now deceased; Cincinnati Redevelopment Corp. (C.R.C.); Associated Dry Goods Corporation; H. & S. Pogue Co. Inc.; Adcor Realty Company; Morgan Guaranty Trust Co., which acquired the title to the property from Adcor Realty Company under a lease-back arrangement; the Regional Director of HUD; and the Secretary of the United States Department of Housing and Urban Development, the latter two of whom were voluntarily dismissed from the case.

This matter was tried in the District Court without a jury. The District Court held plaintiffs had standing, that construction of the garage along Fourth Street, rather than along Elm Street, violated the Urban Renewal Plan, and entered a mandatory injunction requiring defendants to make alterations to the garage (Appendix page 4). The Court of Appeals for the Sixth Circuit reversed the mandatory injunction and remanded the case to the District Court with instructions to dismiss the complaint. The Court of Appeals held that parties outside the Urban Renewal Area do not have standing to question the design

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Opinion of the District Court was filed July 26, 1971. The United States Court of Appeals for the Sixth Circuit on June 26, 1973, reversed the District Court's decision, remanded the case to the District Court with instructions to dismiss the complaint against the City of Cincinnati and other named defendants.

and location of buildings which have been approved by the Urban Renewal Authority as being in conformity with the Plan. (Appendix pages 5 and 6).

ARGUMENT

The issue presented in this case is whether plaintiffs, who are retail merchants, outside an urban renewal area, may invoke the jurisdiction of the Federal Courts to air their general complaints regarding the legislative determination of use, design, and location of structures within a designated urban renewal area. This Court has decided the issue in *Berman* v. *Parker,* 348 U.S. 26 (1954), therefore, a review of this case on certiorari is unwarranted.

The City of Cincinnati has strongly contested jurisdiction, contrary to the assertion of plaintiffs, that "Jurisdiction was not contested by the defendants". (Petition page 16).

Article III of the United States Constitution limits the judicial power of federal courts to *cases* and *controversies* wherein the federal courts determine they have jurisdiction, the parties have standing, and there exists a justiciable controversy. None of the elements of a *case* or *controversy* are present in this case.

I

THE COURT OF APPEALS DECISION IS CORRECT.

To invoke the judicial power of the federal courts plaintiff must have standing and the Court must have jurisdiction. In this case plaintiffs fail to meet the standing tests, they suggest:

1) As federal taxpayers;
2) Under the Administrative Procedure Act;
3) As persons having a personal stake in the outcome of the case; and
4) As private attorneys general.

Both the District Court and Court of Appeals rejected as "untenable" plaintiffs' contention of standing as federal taxpayers and under the Administrative Procedure Act (Appendix page 5). We agree, and since plaintiffs have failed to argue standing as federal taxpayers or under the Administrative Procedure Act, assume they, too, consider such contentions "untenable".

The thrust of plaintiffs standing argument is directed to this Court's decision in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), and *Barlow* v. *Collins*, 397 U.S. 159 (1970). This Court decided both cases the same day and established a three-prong standing test. The elements of the test are:

1. Whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise (397 U.S. at 152),
2. Whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question (397 U.S. at 153),
3. Whether judicial review has been precluded (397 U.S. 156).

However, the standing test announced in *Data Processing* is applied only after the question of jurisdiction in the federal courts is considered in the framework of Article III of the United States Constitution,

> "As we recently stated in *Flast* v. *Cohen*, 392 U.S. 83, 101, '[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context in a forum historically viewed as capable of judicial resolution." (397 U.S. at 151).

In the present case, plaintiffs attack the determination of Cincinnati City Council, the legislative body that conducted the public hearings, enacted the ordinances, and implemented the City Urban Renewal Plan. Historically the proper forum for resolution of plaintiffs' disputes regarding location and design of urban renewal improvements is City Hall. The federal courts are not the forum, nor is it the function of the federal courts to sit in review of legislative determinations. *Berman* v. *Parker*, 348 U.S. 26 (1954). Assuming, arguendo, there was an Article III *case* or *controversy* in this case, plaintiffs still fail to meet the standing tests of *Data Processing* v. *Camp*, 397 U.S. 150 (1970).

1. *Economic Injury Test.* Plaintiffs contend there has been injury to their economic interests. This is fallacious. Nowhere in the proof nor District Court findings is there anything which resembles rules, regulations, ordinances, statutes or conduct, directed toward suppression of plaintiffs' equal economic opportunity in the market place.

2. *Zone of Interests Test.* The "zone of interests" test set forth in *Data Processing* goes to the merits of a case. The question is whether the interest sought to be protected is regulated or protected by a constitutional guarantee. Here, plaintiffs are all located outside the urban renewal area and have no personal stake, nor are they within the

zone of interest protected or regulated by statute or constitutional guarantee.

The Slum Clearance-Urban Renewal Statutes, 42 U.S.C. § 1441, et seq., were not enacted by Congress to protect nor guarantee plaintiffs' economic zone of interest. Nothing was taken from plaintiffs in violation of the Fifth and Fourteenth Amendments to the United States Constitution or the Constitution of the State of Ohio.

3. *Judicial Review is Precluded.* The Slum Clearance-Urban Renewal Satutes, 42 U.S.C. § 1441, et seq., do not give rise to a cause of action. The Court of Appeals said in its opinion:

> "No cases have been cited to us by the [District] Court or by the parties, nor have we found any cases, where persons located outside the Urban Renewal area have been permitted to question the design or location of buildings approved by the agency (the City, in the present case) as being in conformity with the Plan, said agency having been authorized by Congress to act. There is no general statutory right of appeal to the United States District Court from decisions of federal, local, or public agencies, and private persons engaged in urban renewal projects * * *." (Appendix page 5)

Plaintiffs suggest in their petition the Court of Appeals has incorrectly applied the teachings of *Data Processing* v. *Camp,* 397 U.S. 150 (1970), and *Barlow* v. *Collins,* 397 U.S. 159 (1970), and direct the Court's attention to cases (Petition page 19) they say grant them standing even though they are admittedly outside the Urban Renewal Area. Rather than comment on each of the cases cited by plaintiff it is enough to say that in each the court found the litigant to have standing by virtue of a congressional

act or a constitutionally protected right which had been clearly violated.[4]

II

THERE IS NO CONFLICT OF DECISION.

Plaintiffs assert the decision of the Court of Appeals for the Sixth Circuit is in conflict with decisions of other United States Circuit Courts of Appeal. We disagree.

In *Springfield Television, Incorporated* v. *City of Springfield, Mo.*, 462 F. 2d 21 (8th Cir., 1972), the court found there had been a violation of a protected right guaranteed by the Springfield, Missouri City Charter. The Charter provided no city ordinance granting a public utility franchise would become effective until submitted and approved by a majority of the electors voting thereof. The ordinance granting the franchise had not been submitted to the voters. In *City of Inglewood* v. *City of Los Angeles*, 451 F. 2d 948 (9th Cir., 1972), the plaintiffs were suffering a specific invasion of their protected rights as third party beneficiaries of an agreement between the City of Los Angeles and the Federal Aviation Administration. In *Virgin Islands Hotel Association* v. *Virgin Islands W & P Authority*, 465 F. 2d 1272 (3rd Cir., 1972), the defendant increased electric power rate charges without providing a proper and meaningful hearing as required by statute.

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[4] *Investment Company* v. *Camp*, 401 U.S. 617 (1971), specific violation of the Glass-Steagall Act; *Baker* v. *Carr*, 369 U.S. 186 (1962), one-man one-vote right to representation; *Griggs* v. *Alleghany County*, 369 U.S. 84 (1962), citing *United States* v. *Causcy*, 328 U.S. 356 (1946), eminent domain cases.

III

THE COURT OF APPEALS CORRECTLY DECIDED THE STATE QUESTIONS OF STREET VACATION NOTICE AND GOVERNMENTAL IMMUNITY.

Contrary to the plaintiffs' conclusion at page 22 of their Petition for a Writ of Certiorari, the Court of Appeals relied on *State ex rel. Merritt* v. *Linzell,* 163 Ohio St. 97, 126 N.E. 2d 53 (1955), for the proposition that plaintiffs have no property right in the continuance or maintenance of the flow of traffic past their property and that diversion of traffic as a result of public improvement is not an impairment of a property right for which damages may be awarded (Appendix, page 13); and the Court of Appeals did not rely on said case in approving the City's street vacation without notice to plaintiffs.

Instead the Court of Appeals relied upon Section 723.06 of the Ohio Revised Code (erroneously designated as Section 723.09 at page 9 of the plaintiffs' Petition) which clearly states that notice of the intention of the legislative authority of a municipal corporation to vacate any street need not be published where there is filed written consent to such vacation with the legislative authority by the owners of the property *"abutting the part"* of the street proposed to be vacated. The Court of Appeals correctly accepted the City's contention that the controlling language here is *"abutting the part"* and that where the City was the fee owner of all the property abutting the part of the sidewalk vacated on the north side of Fourth Street, and where City Council on its own initiative as provided by law took action by Ordinance No. 147-1966 (Plaintiffs' Exhibit B-1) to vacate said portion of the sidewalk abutting its property, the conclusion must be that the City as abutting

owner consented to the vacation by passage of the ordinance thereby eliminating notice requirements in accordance with Section 723.06 of the Ohio Revised Code.

The plaintiffs on the south side of Fourth Street do not abut upon the part of the sidewalk that was vacated on the north side of Fourth Street. The case of *Bulen* v. *Moody*, 77 Ohio App. 61, 63 N.E.2d 916 (Franklin County, 1945), relied upon by the City in its briefs and argument before the Court of Appeals, clearly disposes of plaintiffs' contention that they were abutting owners entitled to notice of vacation. The Franklin County Court of Appeals stated in its opinion at page 64:

> ". . . it is our conclusion that the plaintiff is not an abutting property owner on the vacated part of the . . . alley . . . . There is no physical connection between the plaintiff's property and the portion of the alley vacated; thus the plaintiff's property does not abut upon the vacated portion of the . . . alley. 'Abutting' is a word of common usage. The lexicographers define it to mean 'to end'; 'to border on'; 'to touch'. 'Abutting' means any property that abuts or adjoins.
>
> No notice to the plaintiff of the vacation of such part of the alley was necessary."

This case is the single Ohio case most similar to the instant matter and clearly stands for the proposition that abutting means physically touching.

The plaintiffs confuse the rights they may have in the vehicular traveled portion of Fourth Street with physically "abutting," for *purposes of notice* upon the *part* of the street vacated. The vacation did not interfere with any access rights that the plaintiffs have to the center of Fourth Street or over its entire width; in fact, the Court of Appeals recognized in its opinion that Fourth Street was not narrowed (Appendix, page 13), and the District Court be-

low in its Memorandum Decision (Appendix, page 84) concluded:

> "We likewise conclude that failure to give notice to the plaintiffs in connection with street vacation proceedings (Fourth Street, Race Street and Elm Street), though pertinent as one of the circumstances which has to be assessed in determining the fourth cause of action, does not give rise to a cause of action for legal and equitable relief of the type the plaintiffs seek — where, as in this case, the *travelled* portion of the street on which the plaintiffs' businesses and properties are located is not narrowed."
>
> As heretofore noted (*Page 21*), the street was narrowed from 50 feet to 40 feet by the vacation. However, the vacated portion was the part of the street on which the sidewalk opposite plaintiffs was located. The vacation, therefore, in no wise affected the easement of the property owners among the plaintiffs to have ingress and egress to their properties. They have no other easements or property rights in the vacated portion of the street. As this indicates, we reject the contention of the plaintiffs that they have a cause of action for invasion of easements for light, air and view."

Plaintiffs' confusion of their rights to access in the vehicular portion of Fourth Street with physically "abutting" for *purposes of notice* upon the *part* of the Fourth Street sidewalk vacated is emphasized by their citing the cases of *State ex rel. McKay* v. *Kauer,* 156 Ohio St. 347, 102 N.E. 2d 703 (1951), and *Fry* v. *O'Leary,* 141 Wash. 465, 252 Pac. 111, and 49 A.L.R. 1249 (1927). These again were two cases involving limitation of access to or narrowing of the traveled portion of the public street and the consequential pro tanto taking of property rights from abutting owners. In fact, the *Kauer* case cited the *Fry* case for the limited purpose of indicating that the majority of American jurisdictions have adopted the rule of "pro tanto taking" as a

basis for compensation. The *Fry* decision was not based upon the right of owners on the other side of the street to be notified of the vacation, for the Washington Supreme Court stated at page 252:

> "There can be no question but what, under our decisions, the power of vacation of streets and alleys or portions thereof belongs to the municipal authorities, and the exercise of that power is a political function which, in the absence of collusion, fraud, or other interference with a vested right, will not be reviewed by the court; and the one who suffers damages similar to those sustained by the public generally will not be heard in complaint."

Also the *Fry* case originated in the State of Washington where an owner has a right to view, light and air in the street, but Ohio does not allow a right to air, light and view in the street to an abutting owner as held by the Ohio Supreme Court in the case of *State ex rel. Schiederer* v. *Preston,* 170 Ohio St. 542, 11 O.O. 2d 369 (1960).

Vacation of the sidewalk on the north side of Fourth Street in the instant case did not interfere with plaintiffs' access on the south side of Fourth Street. There is no allegation of collusion or fraud in the instant action regarding City Council, and it was stipulated by the parties that the City indeed followed the *same procedure* over the years in vacating a portion of one side of a street, whether upon petition or upon City initiative (Record Volume 30, page 3066). The City simply followed its usual procedure in vacating the sidewalk on the north side of Fourth Street with its legislative arm approving by ordinance the propriety of the vacation.

The controlling language in Section 723.06 of the Ohio Revised Code is *"abutting the part."* This is different than the language used in the levy of special assessments

for street improvements, for instance, where the assessment is levied against all property abutting the street. Such assessment language as used in *Cincinnati* v. *Batsch,* 52 Ohio St. 324, 40 N.E. 21 (1895), cited by plaintiffs, pertains simply to assessments and is quite logical. It does not refer to the notice or waiver thereof mentioned in Ohio Revised Code Section 723.06, and this case at best indicates that plaintiffs on the south side of Fourth Street would be liable for assessment for the widening of Fourth Street on the north side should there be an assessment for such improvement. The theory again being based on recognition of the access rights of the abutting owner to the traveled portion of the street which were not interfered with in the instant case.

IV

URBAN RENEWAL IS A GOVERNMENTAL FUNCTION.

The Court of Appeals was correct in finding that urban renewal activities are classed as governmental and not proprietary in Ohio, and that the City of Cincinnati cannot be held liable for performance of such acts. Just because Cincinnati voluntarily elected to contract with the Federal Government to undertake the Central Business District, Core Urban Renewal Project cannot serve to make that project a "private and proprietary function." If that were so, every federal aid program voluntarily undertaken by state, county and municipal governments — interstate highway systems, county welfare programs, local anti-poverty programs to mention some better known examples — would be transformed from a governmental to a proprietary function.

Ohio recognizes slum and blight clearance and prevention as a public purpose in the landmark case of *State, ex rel. Bruestle* v. *Rich,* 159 Ohio St. 13, 110 N.E. 2d 778 (1952), where Syl. 1 holds that when an urban redevelopment project has as its primary purpose the elimination of slum conditions and prevention against their recurrence, such project may involve a public use or purpose within the meaning of Section 19, Article I of the Ohio Constitution for which public funds can be expended and the power of eminent domain exercised.

In view of the purposes of Central Business District, Core Urban Renewal Plan, deemed by Cincinnati City Council to be necessary to protect the public health, safety, property and welfare of the residents thereof, including the reduction of crime and losses from fire and accident, and in view of the *Bruestle* case holding that an urban renewal project involves a public purpose, the Court of Appeals properly found and determined that the City of Cincinnati was exercising the police power of the state in implementing the Central Business District, Core Urban Renewal Project including Block D and hence was engaged in the performance of governmental functions as held by the United States District Court in *Sayre* v. *United States,* 282 F. Supp. 175 (D.C. Ohio 1967), and not liable for alleged injuries arising out of the City's performance of said urban renewal activities.

Certainly a municipal corporation engaged in urban development activities to remove blight and thereby safeguard the public health, safety, property and welfare, reduce crime and losses from fire and accident meets the governmental function test of *Wooster* v. *Arbenz,* 116 Ohio St. 281, 156 N.E. 210 (1927), just as nicely as does a municipal corporation engaged in the health-preserving service of collecting garbage for its inhabitants, *Broughton* v. *Cleveland,*

167 Ohio St. 29, 146 N.E. 2d 301 (1957), or in the improvement of streets as in the *Arbenz* case itself.

Contrary to plaintiffs' contention, Ohio's doctrine of sovereign immunity does not violate the Fifth and Fourteenth Amendments to the Federal Constitution, nor does the Civil Rights Act abrogate said doctrine as held by the Court of Appeals for the Sixth Circuit in *Corbean* v. *Xenia City Board of Education*, 366 F. 2d 480 (6th Cir. 1966).

The Ohio cases cited by plaintiffs at page 23 of their Petition For A Writ of Certiorari in support of the proposition that Article I, Section 19 of the Ohio Constitution is violated when property is taken completely or pro tanto by a city without compensation to its owner, are not applicable to the instant case where it is clear from the undisputed facts that there has been no taking of plaintiffs' properties by defendants within the meaning of the Ohio and Federal Constitutions requiring payment of just compensation. The losses allegedly occasioned to plaintiffs were not the result of any intrusion or encroachment by defendants upon plaintiffs' properties and businesses. Rather plaintiffs claim their losses were caused by the loss of customers when the former retail-commercial area on the north side of Fourth Street between Race and Elm Streets was transformed into a shopper-oriented 1200 car garage by the CBD Core Urban Renewal Plan. Loss of customers is not a taking of property in a constitutional sense, and the action of defendants has not resulted in the diminution of plaintiffs' rights in their properties and businesses. *Woodland Market Realty Co.* v. *Cleveland*, 426 F. 2d 955 (6th Cir. 1970). *Sears* v. *City of Cincinnati*, 31 Ohio State 2d 157, 285 N.E. (2d) 732 (1973), is not controlling in the instant case since in *Sears* the Ohio Supreme Court found that operation of a municipal hospital is not a service essential to municipal government, nor an inherently gov-

ernmental function; however, urban renewal has been held by the same Ohio Supreme Court to be governmental and a matter of general public welfare for which the power of eminent domain can be exercised by the City. Eminent domain is necessary for urban renewal and can be exercised by the City alone for such lawful purpose of government.

V

THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The suggestion that this Court should exercise its power of supervision because the Court of Appeals for The Sixth Circuit departed from the accepted and usual course of judicial proceedings, is so totally without merit no additional comment is necessary.

CONCLUSION

This Court for all of the foregoing reasons should deny the Petition For a Writ of Certiorari.

Respectfully submitted,

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